IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NO. 77-36

SABINE TOWING AND TRANSPORTATION CO., INC.,
Petitioner

v.

ZAPATA UGLAND DRILLING, INC.,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SABINE TOWING AND TRANSPORTATION COMPANY, Appellant in the Court below, prays that a Writ of Certiorari issue to review the Judgment of the Fifth Circuit Court of Appeals entered in this cause on June 6, 1977, affirming the Judgment of the United States District Court for the Eastern District of Texas (Beaumont Division) entered February 23, 1976.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit has not yet been reported. The opinion of the Court is printed in Appendix A hereto. The District Court entered Judgment without opinion in this case. The Judgment of the District Court is printed in Appendix B hereto. The Findings of Fact and Conclusions of Law of the District Court are printed as Appendix C hereto.

JURISDICTION

The judgment of the Fifth Circuit Court of Appeals was entered on June 6, 1977. This court has jurisdiction to review the Judgment by Writ of Certiorari under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. In a maritime collision case, is the value of a vessel's services under an existing contract an appropriate measure of damages for the detention, where the collision in no way hindered the vessel's performance under that contract, nor denied the claimant any profits thereunder?

2. If pre-judgment interest in admiralty cases is the rule, should the rate of interest be open to proof, subject only to the discretion of the court, or should it be restricted to the state's prevailing rate of legal interest?

STATEMENT OF THE CASE

On June 2, 1974, the harbor tug M/V VULCAN, owned and operated by Petitioner, Sabine Towing and Transportation Company, Inc., was assisting the ZAPATA UGLAND, a large semi-submersible drilling rig,

operated by Claimant-Appellee, Zapata Ugland Drilling, Inc., to sea via the Port Arthur Ship Channel. The M/V VULCAN came into collision with the port pontoon of the drilling rig, causing sufficient damage to require a return to the harbor for repairs. Repairs were completed on June 6, 1974, at 2100 hours; however, the ZAPATA UGLAND was unable to depart for its ultimate destination, Aberdeen, Scotland, until June 9, 1974, 1300 hours due to adverse weather conditions. The time between the first sailing attempt and the second departure was seven days and seven hours.

As a result of this collision, Zapata submitted a claim for damages in the amount of $323,054.55, to Sabine on July 6, 1974. On August 1, 1974, Sabine filed its Complaint in Admiralty for exoneration from and/or limitation of liability, pursuant to 46 U.S.C. Section 182 *et seq.*, in the United States District Court for the Eastern District of Texas, Beaumont Division. Zapata filed its Claim and Answer seeking damages in the amount of $370,000.00. Sabine filed a counter claim for unpaid towage charges in the amount of $14,290.01. Trial was had on October 23, 1975.

The evidence with respect to the detention or loss of use claim for the ZAPATA UGLAND is demonstrative of the issue. There is no question that ZAPATA UGLAND was under contract at the time of the collision. Such contracts, however, provided for initial payment to Zapata, excluding mobilization, on arrival of the ZAPATA UGLAND at Aberdeen, Scotland. The vessel was not producing revenue at the time she left Port Arthur, Texas, and would not do so until she arrived at Aberdeen. There is no question that the ZAPATA

UGLAND had a delayed sailing of seven days and seven hours as a result of the collision. Notwithstanding, this was not the only delay with respect to the ZAPATA UGLAND, nor did such delay represent a loss of profits to Zapata.

The inception of the ZAPATA UGLAND was in a contract between Bethlehem Steel Corporation and Ugland Shipping Co. A/S of Norway. This contract provided for delivery of the rig to Ugland 21 months from November 18, 1971. This contemplated an August, 1973, delivery. In a Time Charter by Demise dated June 3, 1972, between Ugland and Zapata, it was stated in Section 4 that delivery of the ZAPATA UGLAND to Zapata, as charterer, would be "not later than October, 1973". In Drilling Contracts with Forest Petroleum U.K. Ltd. and Total Oil Marine Ltd. dated October 29, 1973, and January 8, 1974, respectively, it was stated that the ZAPATA UGLAND would be delivered at Aberdeen, Scotland, by June 1, 1974. None of these delivery dates was met, as the ZAPATA UGLAND made her first attempted sailing on June 2, 1974, the date of this collision. Again, while repairs to the rig were completed at 2100 hours on June 6, 1974, the ZAPATA UGLAND could not sail because of severe wind conditions until June 9, 1974 at 1300 hours. Moreover, when the ZAPATA UGLAND ultimately departed Port Arthur, Texas, for her maiden voyage to the North Sea, she was embarking on a probable three to four week journey which ultimately turned out to be a record crossing. This record crossing was made notwithstanding decreased speed of the ZAPATA UGLAND because of problems with the BAFFIN SERVICE, her assisting tug. Thus, while there was a

delay as a result of the collision, it was not the only delay, nor was it a single cause or condition relating to the delay in commencement of Zapata's contract.

Zapata arrived in the North Sea and began work for Total on July 1, 1974. Zapata's contract with Total, which by agreement encompasses the drilling of two wells for Forest, is not for a definite term, but for a term of 730 days, plus the time necessary to complete or abandon any well being drilled at the completion of the term. Additionally, the Total contract can be extended, per agreement, for additional terms. The ZAPATA UGLAND was the sole asset of Zapata, and was Claimant's sole means of revenue. Up to the point of trial the company had yet to earn any profit.

Following submission of briefs on damages, the District Court entered its Findings of Fact and Conclusions of Law, (Appendix C), wherein liability was found with denial of limitation, and damages were set at $289,078.-02. Of this latter figure, $206,264.48 was awarded to Zapata as lost profits.

Sabine appealed to the Fifth Circuit only as to the damage award. The Court of Appeals placed the case for disposition on its summary calendar, and in a *per curiam* opinion, affirmed the District Court's decision in all respects. (Appendix A) In upholding the propriety of the detention award, the Court states:

> "According to the settled law in this circuit, Zapata was entitled to damages for the loss of use of the ZAPATA UGLAND during the entire period it was delayed from beginning its drilling contract and the contract rate may be used as a proper evidentiary guide in measuring that loss. (Citing cases)"

An award of pre-judgment interest was stated by the Court as the rule rather than exception, subject to peculiar circumstances. It was held that a rate of 12% was within the discretion of the district court, even though this rate was greater than the prevailing statutory rate by the law of the state. The rate was based on Zapata's cost of borrowing money.

REASONS FOR GRANTING THE WRIT

I. The decision below establishes an inequitable rule of evidence with respect to detention damages in marine collision cases.

In the *Conqueror*, 166 U.S. 110, 17 S. Ct. 510, 41 L.Ed.2d 937 (1897) the Court held:

> "That the loss of profits for the use of a vessel pending repairs, or other detention, arising from a collision, or other maritime tort, and commonly spoken of as demurrage, is a proper element of damage, is too well settled both in England and America to be opened to question. *It is equally well settled, however, that demurrage will only be allowed when profits have actually been, or may be reasonably supposed to have been, lost, and the amount of such profits is proved with reasonable certainty. . .*
>
> "In order to entitle a party to be indemnified for what is termed in this Court as a consequential loss, being for the detention of this vessel, *two things are absolutely necessary — actual loss and reasonable proof of the amount . . . it does not follow as a matter of necessity, that anything is due for the detention of a vessel while under repair.*" (Emphasis added) (166 U.S. at 125).

And the Court again spoke in quoting from an English case the opinion of Lord Eisher:

> "It has been pointed out, and I think quite fairly, That you cannot recover by way of damages on account of something which you call profit, but of which profit there is no evidence." 166 U.S. at 129.

The *Conqueror* is often cited. In the *Nicolaou Maria*, 143 F.2d 406 (5th Cir. 1944) the Court held:

> "The allowance of demurrage for loss of the use of a commercial vessel pending repairs arising from a collision depends upon whether profits actually have been, or reasonably may be supposed to have been lost. *Detention alone does not entitle an owner to demurrage*; it must be shown with reasonable certainty that the vessel would have been employed if she had been in good repair. The burden of establishing that profits were lost was upon the owners of the (vessel)." (143 F.2d at 407) (Emphasis added)

The Court went on to say in the *Nicolaou Maria*:

> "The delay in completing performance of the charter party to Liverpool was not financially prejudicial to appellees, for the full contract price of the charter party was paid plus all out of pocket expenses incurred during the seven day delay. Evidence also fails to show that profits actually were lost because the delay postponed the availability of the vessel for other employment." (143 F.2d at 407)

In *Navigazione Liberia T.S.A. v. Newton Creek T. Company*, 98 F.2d 694, the Court of Appeals for the Second Circuit held:

> "The libelant appears to suppose that there are absolute rules applicable to detention which take it out of the usual principal that damages are *only for* indemnity. It is at times hard to say how much an owner has lost, but no case holds, when it affirmatively appears that he has lost nothing, that he can recover. The *Conqueror*, . . . very clearly lays it down that the *only basis* for damages is *proof of loss of profits* . . ." (Emphasis added) 98 F.2d at 699.

Unquestionably, the admiralty doctrine of *restitutio in integrum* requires that the ship owner *actually sustain the loss* which it seeks to have reimbursed. *The Potomac*, 105 U.S. 630, 26 L.Ed. 194 (1882). The evidentiary requirements of lost profits must certainly go beyond the holdings of our case. With this decision it is clear that *The Conqueror* is no longer followed in the Fifth Circuit Court of Appeals, although it is frequently cited in opinions which have otherwise ignored it. *See, Continental Oil Company v. S/S ELECTRA*, 431 F.2d 391 (5th Cir. 1970) *cert. den.* 401 U.S. 937, 91 S.Ct. 925, 28 L.Ed.2d 216 (1971). This latter case is quite illustrative of the direction the Fifth Circuit is taking in assessing damages of this character. In *Continental Oil*, defendant's vessel collided with an offshore drilling platform which resulted in the suspension of production from plaintiff's oil wells for 130 days. No oil was lost, nor was there any damage to the well; therefore, the oil was still intact and available to the plaintiffs ultimately for the realization of profits. These facts notwithstanding, the Court reversed the District Court's findings that plaintiffs were not entitled to the net income which would have been realized from the well during the 130 day period. In response to the defendants' argument that the oil was still wholly intact

as a capital asset, and allowance of net production income constituted a double recovery, the court stated:

> "All of this wholly misses the mark. The oil companies do not claim for lost oil or damage to oil as an asset. Their suit is for damages suffered as a consequence of the collision of the ship with the platform. Profit on oil production is simply one means of measuring the damage suffered. The plaintiffs have lost the use of their capital investment and lease, platform and producing wells for 130 days during which that investment was tied up with return. The fact that the same amount of profit can be made at a later time with the same investment of capital by removing from the ground a like quantity of oil at the same site does not alter the fact that the plaintiffs are out of pocket a return on 130 days use of their investment. Presumably the oil companies will produce from the reservoir all the oil that is economic to produce but as the District Court pointed out, it will require 130 days longer to do so . . . This is no theoretical, shadowy concept of loss. It is squarely within the basic damage doctrine for marine collision of *Restitutio in Integrum* . . .". 431 F.2d at 392

It is submitted that these last two sentences are belied by the holding in the case. The Court clearly stated that what the plaintiffs had lost was the use of their capital investment in lease, platform, and producing wells for 130 days during which that investment was tied up without return. From this premise the Court admits that the plaintiffs lost nothing *[illegible]* that particular reservoir as a result of the collision — their profits will be the same as if the collisions had never occurred. And yet, the Court held that "profit on oil production is simply one means of measuring the damage suffered. (*Id.*) It cannot re-

alistically be contended that this is anything other than a windfall award. Where have we come in proof of lost profits, and *restitutio in integrum?*

The case *sub judice* is substantially similar to *Continental Oil Company* and indeed, the Court below cited that case as controlling. Zapata was operating under a contract which would not commence, nor produce revenue, until the drilling unit arrived in Aberdeen, Scotland, and which would be effective for a basic period of 730 days with two optional extension periods.

By the evidence, Zapata had encountered numerous delays in fulfilling its contract. The subject collision was the source of only one delay. Zapata would, by contract, presumably work for as long as originally obligated. It would generate the full revenue of its contract, albeit, leading to no profit to point of trial. No loss of profit would occur. Yet, with the state of the law in the Fifth Circuit, damages are proved and properly awarded on proof of a contract to be undertaken in the future. This is not a preservation of the well-founded principle of *restitutio in integrum*. The Court below has reached the point when "what is claimed to be consequence is only fortunity." *Kinsman I*, 338 F.2d 708, 725 (2nd Cir. 1964)

This present "rule" of evidence with respect to detention claims in marine collision cases cannot be allowed to stand and should be considered fully by this Court. The result has been the imposition of an evidentiary standard for damages in the Fifth Circuit which allows grossly excessive windfall recoveries on the basis of wholly speculative losses. It is especially unfortunate that this is the standard being applied by the Fifth Circuit,

which has jurisdiction and speaks to substantial litigation arising out of maritime operations in the United States. The impact of the decision below goes far beyond the facts of the present case, and affects the entire marine industry. If this be the proper standard to apply, this Court should make that pronouncement so that the maritime community can properly guard against losses of such massive proportions.

As the situation currently stands, however, this standard is indeed settled in the Fifth Circuit. *Please see, Delta Marine Drilling Co. v. M/V BAROID RANGER*, 454 F.2d 128 (5th Cir. 1972); *Skou v. United States*, 526 F.2d 293 (5th Cir. 1976). Taken along with the instant case, these holdings establish that a marine collision claimant need only prove a delay and a contract to recover damages above and beyond his *full contractual profit*. He is no longer required to show that the delay occurred during the contractual term. *Moore-McCormack Lines v. Camden*, 244 F.2d 198 (2nd Cir. 1957) *cert. den.* 355 U.S. 822 (1951); or, if not, then evidence of the marketability of the vessel. *Nicolaou Maria*, 143 F.2d 806 (5th Cir. 1944). In short, the rule that "in no event can *more than net profits* be recovered by way of damages", *The Potomac* 105 U.S. 630 (1880), is now abrogated, and a claimant is no longer required to prove this loss with "reasonable certainty". (*The Conqueror, supra*)

Alarmingly, the influence of the Fifth Circuit on this issue is being felt elsewhere. *Pinto v. Fernwood*, 507 F.2d 1327 (1st Cir. 1974), *citing Delta Marine, supra*, at page 1331.

It is submitted that the standard adopted by the Fifth Circuit is severely flawed, to the point of being unmanageable. If any further reference to this point be necessary, the Court should note the application of the standard to the facts of the case before it. The ZAPATA UGLAND was an untested and untried rig on her maiden voyage. The rig was damaged and accordingly delayed for a seven day period while *en route* to a transatlantic crossing in order to perform a contract which would not begin until the rig arrived at her destination. There was no penalty suffered under the contract, yet as a result of the collision, Zapata is going to be awarded an operating rate for seven days *in addition to her full, unreduced benefits under the contract*. The situation on its face begs for determination of this Court for a new standard.

It may well be that the proper evidentiary standard has not yet been enunciated by either a court or counsel on this issue. The issue is, nonetheless, ripe for determination and the case before the Court presents an appropriate vehicle for doing so.

II. The decision below that it is within the discretion of the court to award pre-judgment interest in admiralty at a rate equivalent to a party's cost of borrowing, even though this rate is greater than the state's prevailing statutory rate, is contrary to rational and orderly justice and an appropriate rule should be established by this Court.

The District Court in this case set the rate of pre-judgment interest at 12%, which was Zapata's cost of borrowing money. The relevant statutory rate of interest in Texas at the time of the collision was 6%, a rate later

amended to 9% on September 1, 1975. TEX. REV. CIV. STAT. Art. 5069-1.05. The Fifth Circuit affirmed the 12% rate as being within the discretion of the district court, stating that the court was not bound by statutory interest rates.

The Court's decision was contrary to its own general rule that pre-judgment interest be based on the legal rate prevailing in Texas at the time of the collision. *Johnson Barge Co. v. Mid Valley, Inc.*, 243 F. Supp. 243 (S.D. Tex. 1963), *aff'd. per curiam*, 337 F.2d 898 (5th Cir. 1964); *Geotechnical Corp. of Delaware v. Pure Oil Co.*, 214 F.2d 476 (5th Cir. 1954); *The Leonie O. Louise*, 4 F.2d 699 (5th Cir. 1925).

Such a rule is contrary to a fair and orderly system of justice and should be considered by this Court. For example, the rule could lead to even higher rates than 12% to financially unstable claimants, since they represent a greater financial risk and, therefore, are subject to higher costs of borrowing money. While there are different rates of statutory interest in the several states, it most certainly follows that an orderly system of justice requires definitive standards in the award of pre-judgment interest. There is no reasonable benefit to be derived from the rule of the Court below, and this Court should authoritatively undertake to pronounce a more reasonable standard.

CONCLUSION

This case goes well beyond adjusting the rights and liabilities of the parties to a collision in the Port Arthur Ship Channel. The maritime industry of the United States is burgeoning at a rate which defies calculation. If de-

tention damages are to be set under the flawed standard of the Fifth Circuit, this entire community needs to be informed of that fact by this Court.

Petitioner prays that a Writ of Certiorari issue to authoritatively define the rules of law to be followed in marine collision-detention damage claims and calculation of pre-judgment interest, and to preserve the integrity of well-ordered judicial proceedings.

Respectfully submitted,

By _____

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CERTIFICATE OF SERVICE

I certify that three (3) copies of the foregoing Petition for Writ of Certiorari for Petitioner, Sabine Towing and Transportation, Inc. were served upon Mr. Joseph Cheavens, Baker and Botts, One Shell Plaza, Houston, Texas 77002, attorneys for Respondent, Zapata Ugland Drilling, Inc., by mailing same this 6th day of July, 1977.

_____
W. GARNEY GRIGGS

APPENDIX A

Complaint of Sabine Towing & Transportation Co., Inc., as owner of the M/V VULCAN in a cause of Exoneration from and/or Limitation of Liability.

SABINE TOWING AND TRANSPORATION COMPANY, INC.,
Plaintiff-Appellant,

v.

ZAPATA UGLAND DRILLING, INC.,
Defendant-Appellee.

NO. 76-1986

Summary Calendar*.

UNITED STATES COURT OF APPEALS
Fifth Circuit.

June 6, 1977.

In an action for exoneration and limitation filed by owner of harbor tug, following collision with a large semisubmerisble drilling rig, tug owner appealed from damages award made by the United States District Court for the Eastern District of Texas, at Beaumont, William M. Steger, J. The Court of Appeals held that: (1) charterer of rig was entitled to damages for loss of use of rig during entire period it was delayed from beginning its drilling contract, and the contract rate could be used as a proper evidentiary guide for measuring that loss,

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* Rule 18, 5 Cir.; *see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al.*, 5 Cir. 1970, 431 F.2d 409, Part. I.

and (2) it was not an abuse of discretion to award prejudgment interest at a rate equivalent to the injured party's cost of borrowing, even though this rate was greater than the prevailing statutory rate.

Affirmed.

* * *

Appeal from the United States District Court for the Eastern District of Texas.

Before BROWN, Chief Judge, and RONEY and HILL, Circuit Judges.

PER CURIAM.

From an admiralty damage award in a ship collision case, appellant challenges the amount of the $289,078.02 judgment. It contends that the district court erred in awarding loss of use damages to the drilling rig damaged in the collision; that damages for towage, repairs and other expenses were not sufficiently proved; that prejudgment interest should not have been awarded; and that the 12% rate for prejudgment interest was excessive and should have been limited to the statutory rate. We affirm.

This action arose out of a collision on June 2, 1974 between the M/V Vulcan, a harbor tug owned and operated by appellant Sabine Towing and Transportation Company, and the Zapata Ugland, a large semisubmersible drilling rig owned by Ugland Shipping Co. of Norway and under long-term bareboat charter to Zapata Ugland Drilling Company. The collision occurred in the Port Arthur Channel of Texas. The appeal judgment was

entered in an action for exoneration and limitation filed by Sabine. Liability is not challenged, only the damage award.

[1] According to the settled law in this Circuit, Zapata was entitled to damages for the loss of the use of the Zapata Ugland during the entire period it was delayed from beginning its drilling contract and the contract rate may be used as a proper evidentiary guide for measuring that loss. *Skou v. United States,* 526 F.2d 293 (5th Cir. 1976); *Delta Marine Drilling Co. v. M/V Baroid Ranger,* 454 F.2d 128 (5th Cir. 1972). *See generally* Black & Gilmore, *The Law of Admiralty* 526 (2d ed. 1975). *See also Continental Oil Co. v. SS Electra,* 431 F.2d 391 (5th Cir. 1970), *cert. denied,* 401 U.S. 937, 91 S.Ct. 925, 28 L.Ed.2d 216 (1971); *Agwilines, Inc. v. Eagle Oil & Shipping Co.,* 153 F.2d 869 (2d Cir. 1946). For this purpose, the district court properly used the rate provided in the amended retroactive contract, the amount Zapata would have been entitled to collect had the rig been operating during the period, less operating costs saved.

A review of the record reveals sufficient evidence to support the award for other expenses, including the actual cost of repairs, the charter hire of M/V Baffin Service, and other incidental expenses, all reasonably necessary for repair of the vessel.

[2] As to petitioner's contention that prejudgment interest was unwarranted, we note that in admiralty cases the award of prejudgment interest from the date of loss is the rule rather than the exception. *Gulf Oil Corp. v. Panama Canal Co.,* 481 F.2d 561, 570-571 (5th Cir. 1973); *Managua Navigation Co. v. Aktieselskabet Borge-*

stad, 7 F.2d 990, 993 (5th Cir. 1925). Discretion to deny interest must be based on the existence of peculiar circumstances, none of which are present in this case. *See American Zinc Co. v. Foster*, 441 F.2d 1100, 1101 (5th Cir.), *cert. denied*, 404 U.S. 855, 92 S.Ct. 99, 30 L.Ed. 2d 95 (1971); *Kawasaki Zosensho v. Cosulich Societa Triestina di Navigazione*, 11 F.2d 836, 838 (5th Cir. 1926).

[3] The district judge set the rate of interest at 12%, which was Zapata's cost of borrowing money. Although in *Geotechnical Corp. v. Pure Oil Co.*, 214 F.2d 476, 478 (5th Cir. 1954), we noted that a federal court may consider by analogy the law of the state as the proper basis for establishing an interest rate, we expressly stated that the court was not bound by statutory interest rates. Since prejudgment interest is awarded as compensation for the wrong done, *Sinclair Refining Co. v. SS Green Island*, 426 F.2d 260, 262 (5th Cir. 1970), it was not an abuse of discretion for the district judge to award interest at a rate equivalent to the injured party's cost of borrowing, even though this rate was greater than the prevailing statutory rate.

The judgment of the district court is

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

C.A. NO. B-74-235-CA

IN THE MATTER OF THE COMPLAINT OF SABINE TOWING & TRANSPORTATION CO., INC., AS OWNER OF THE M/V VULCAN, IN A CAUSE OF EXONERATION FROM OR LIMITATION OF LIABILITY

(Filed February 23, 1976)

JUDGMENT

BE IT REMEMBERED that on October 23, 1975, this case was called to trial and both parties, by and through their attorneys of record, announced ready. The Court proceeded to hear evidence on October 23 and 24, 1975. After both parties had rested, the Court made certain preliminary findings from the Bench and asked for post-trial briefs. After carefully considering the post-trial briefs filed by the parties and having heard the evidence, the Court made findings of fact and conclusions of law. In accordance with those findings of fact and conclusions of law, it is ORDERED, ADJUDGED AND DECREED as follows:

I.

Claimant, Zapata Ugland Drilling, Inc., shall recover of and from Sabine Towing & Transportation Co., Inc.

the sum of Two Hundred Eighty-Nine Thousand Seventy-Eight and 02/100 Dollars ($289,078.02), together with interest thereon at the rate of twelve percent (12%) per annum, commencing August 1, 1974, until date of entry hereof, at which time interest shall accrue at the rate of nine percent (9%) per annum until satisfaction of this Judgment.

II.

Petitioner, Sabine Towing & Transportation Co., Inc., shall recover of and from claimant, Zapata Ugland Drilling, Inc., the sum of Fourteen Thousand Two Hundred Ninety and 01/100 Dollars ($14,290.01), together with interest thereon in accordance with Paragraph I hereof.

III.

Costs of court are taxed against petitioner, Sabine Towing & Transportation Co., Inc.

ENTERED at Beaumont, Texas, this 23rd day of February, 1976.

/s/ WILLIAM M. STEGER
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

C.A. NO. B-74-235-CA

IN THE MATTER OF THE COMPLAINT OF SABINE TOWING & TRANSPORTATION CO., INC., AS OWNER OF THE M/V VULCAN, IN A CAUSE OF EXONERATION FROM OR LIMITATION OF LIABILITY

(Filed February 23, 1976)

FINDINGS OF FACT
AND CONCLUSIONS OF LAW

Findings of Fact

1. The ZAPATA UGLAND is a large semi-submersible drilling vessel which was built by Bethlehem Steel Corporation in Beaumont, Texas. The final phases of construction were performed in Port Arthur. The ZAPATA UGLAND is owned by Ugland Shipping Company A/S and affiliated companies of Grimstad, Norway. After delivery of the vessel to Ugland Shipping Company, the vessel was bareboat chartered to Zapata Ugland Drilling, Inc. The charter party has a term of twelve (12) years beginning at the time of delivery to Zapata Ugland Drilling, Inc.

2. Petitioner Sabine Towing & Transportation Company, Inc. (hereinafter referred to as "Sabine") provides

harbor tug services in the Beaumont-Port Arthur area. The fleet of harbor tugs it owns and controls includes the tugs VULCAN, TROJAN and HERMES.

3. On the morning of June 2, 1974, the ZAPATA UGLAND was ready for departure to sea, bound ultimately for the North Sea for drilling off Aberdeen, Scotland. In order to assist the ZAPATA UGLAND to sea, the rig manager employed by Zapata Ugland Drilling, Inc. called Sabine and requested that Sabine dispatch three tugs to assist the drilling vessel. Sabine agreed to provide three tugs, and the VULCAN, TROJAN and HERMES were dispatched. No written contract was entered into for such assistance, and no written invoices or notices for such assistance were received by Zapata Ugland before the collision. There was a contract between the parties, however, for tug services and as part of such contract, Sabine impliedly warranted that the tugs would perform the job in a reasonably safe and workmanlike manner.

4. Also assisting in the tow was the M/V BAFFIN SERVICE. In May, 1974, Zapata Ugland Drilling, Inc. contracted with Zapata Canada, Ltd. for the services of the M/V BAFFIN SERVICE, a multi-purpose deep sea tug and supply vessel. The BAFFIN SERVICE was to assist the ZAPATA UGLAND on the entire voyage from Port Arthur to the North Sea. The BAFFIN SERVICE was hired at a daily rate of $5,000 per day. Before entering into the contract for the BAFFIN SERVICE, Zapata Ugland Drilling, Inc. solicited competitive bids, receiving the $5,000 bid from Zapata Canada, Ltd. and a higher bid from Smit-Lloyd. The $5,000 daily rate for the BAFFIN SERVICE is fair and reasonable under the circumstances.

5. The ZAPATA UGLAND departed the Great Lake Carbon Dock at Port Arthur at approximately 0741. She was towed stern first from the dock by the tugs, VULCAN and TROJAN; the tugs had stern lines secured to the after ends of the starboard and port pontoons, respectively, of the ZAPATA UGLAND. The ZAPATA UGLAND was then towed from the harbor into the main body of the Sabine Neches Canal and turned so that she headed outbound. The VULCAN released her stern line, proceeded up channel, made 180° turn and proceeded back down stream toward the ZAPATA UGLAND with the intention of making up to the inside of the starboard pontoon just aft of the after cross-member. Meanwhile, the BAFFIN SERVICE had secured a towing hawser from the bow of the ZAPATA UGLAND to the stern of the BAFFIN SERVICE, and the TROJAN was executing manuevers to make up to the inside of the port pontoon just aft of the cross-member. During these manuevers, the tug HERMES was released, since she was needed only in the initial stages of the tow. The plan was for the BAFFIN SERVICE to tow the ZAPATA UGLAND down the channel to sea, with the tugs VULCAN and TROJAN assisting at the after end of the starboard and port pontoons. The overall operation was being coordinated and directed by those in charge of the ZAPATA UGLAND and the two pilots sent from Sabine Pilots Association. One pilot was stationed on the ZAPATA UGLAND and the other on the BAFFIN SERVICE.

6. The collision made the basis of this case occurred when the VULCAN slammed into one of the cross-members between the starboard and port pontoons of the ZAPATA UGLAND, causing the VULCAN to turn and

then strike the port pontoon. The Captain of the VULCAN, Paul Phillip Jenkins, Sr., was the only person in the VULCAN pilot house, and he was both steering the VULCAN and operating her engines using the pilot house controls. Captain Jenkins intended to overtake the drilling vessel gradually and, at the last moment when he was alongside the starboard pontoon, to go astern so as to make up gently to the proper location. As the VULCAN approached the ZAPATA UGLAND, however, the VULCAN did not slow down. Photographs taken by a member of the crew of the ZAPATA UGLAND show considerable wheelwash even after the initial impact between the VULCAN and the cross-member. For some reason, the VULCAN never reversed her engines. The failure of the VULCAN's engines to reverse was the direct and proximate cause of the collision.

7. There are only two possible explanations for the failure of the VULCAN to reverse her engines: an unexplained mechanical malfunction aboard the VULCAN and/or failure of Captain Jenkins to reverse the engines in a timely fashion. Either explanation involves fault on the part of Sabine which proximately caused the collision. In either event, Sabine breached its warranty of workmanlike performance which was part of its contractual undertaking with Zapata Ugland Drilling, Inc.

8. If one assumes the collision was caused by mechanical malfunction of the VULCAN, then any such mechanical malfunction arose due to negligence on the part of Sabine itself. The engines of the VULCAN were controlled from the wheelhouse by a pneumatic air control system. Captain Jenkins claimed he placed the wheelhouse controls astern but that the engines continued to go

ahead. Sabine never offered any explanation to substantiate Captain Jenkins' story. Although immediately after the collision Captain Jenkins claimed a malfunction of the equipment, Sabine made no tests, inspections or examinations of the allegedly malfunctioning equipment in its exclusive control prior to or during the extensive repairs of the VULCAN. After the pneumatic air control system was reassembled following repairs, it functioned normally. Thus, Sabine has not sustained its burden of showing that there was a mechanical failure due to a latent defect not discoverable or preventable by the exercise of ordinary care. On the contrary, the evidence shows a lack of due care by Sabine with respect to maintenance and inspection of the equipment. Sabine had no preventative maintenance program which could have discovered any defect before the casualty. No periodic inspections were made, no periodic renewals of old equipment were made and no periodic filter changes were made. Sabine failed to follow the manufacturer's recommended maintenance and inspection practices. Sabine relied entirely upon the crews of the vessels to report any malfunctions after they occurred. This complete lack of preventative maintenance program by Sabine was negligence on its part and rendered the VULCAN unseaworthy before leaving the Sabine dock. Such negligence and unseaworthiness were proximate causes of the collision.

9. The vessel was so equipped that the bridge control system could be overridden by the controls in the engineroom. Thus, if the bridge controls malfunctioned, it should have been possible to reverse the engines of the VULCAN through the engineroom controls. Such a procedure would require the engineer to be in the engineroom with a proper means of communication between him

and the Captain in the pilot house. Sabine acknowledges that good safety practices require that the engineer should be in the engineroom during manuevering to take immediate remedial action should problems arise. At every critical point leading up to and during the collision, however, the engineer of the VULCAN was on deck, near the bow, where he was assisting the deckhands in getting the lines ready to make up to the ZAPATA UGLAND. Sabine had given no written instructions to its engineers requiring them to be in the engineroom during manuevering. Sabine held no meetings on this subject. It completely neglected to inform its engineer of this important safety precaution. In fact, the engineer of the VULCAN was under the impression that he was not required to be in the engineroom during manuevering. Sabine's failure to instruct the engineer on the VULCAN was negligence on the part of Sabine which was a proximate cause of the collision. Further, the lack of instructions to the engineer rendered the VULCAN unseaworthy within the privity and knowledge of Sabine, and such unseaworthiness was a proximate cause of the collision.

10. The only other explanation for the casualty is failure by the Captain of the VULCAN, Paul Phillip Jenkins, Sr., to execute the approach to the ZAPATA UGLAND properly. At the time of the collision, Jenkins was 62 years old and had been with Sabine since 1940. He retired from the company on February 7, 1975. Before the collision, Jenkins had developed serious physical problems, of which the management of Sabine was fully aware. He had a cataract operation of his right eye in 1968 and on his left eye in 1973. Following the eye surgery, he wore thick glasses which did not totally correct

his visual problems. Further, for some nine years before the collision, he had been suffering from moderately severe hypertensive cardiovascular disease. He was under continuous medical treatment for this condition and was under continuous medication for high blood pressure, dizziness and a nervous condition. Despite Sabine's knowledge of Jenkins' actual and potential physical problems, it did not require any periodic physical or visual medical examinations of Jenkins. The last physical examination undertaken by Jenkins at Sabine's request was in 1963. Following the cataract operations, Sabine relied solely on the eye surgeon's certifying Jenkins as fit for duty, without any follow up examinations. No depth perception or sophisticated visual acuity tests were performed following Jenkins' eye surgery. Prior to the collision, Jenkins had been continually aboard the VULCAN for approximately three days and two hours on continuous 24-hour call. Sabine had no policy of requiring the pilots of its tugs to get any set amount of sleep during such periods, and the tug captains caught such rest as they could while on duty. When all of these facts and circumstances are added up, it is only reasonable to conclude that Jenkins' physical condition was a proximate cause of the collision. Considering the totality of the circumstances, the Court finds that Sabine was negligent in monitoring and supervising the physical condition of Jenkins and negligent in placing him in command of the VULCAN. Such negligence was a proximate cause of the collision. Further, the VULCAN was rendered unseaworthy by reason of the physical condition of Jenkins, such unseaworthiness was a proximate cause of the collision, and such unseaworthiness was within the privity and knowledge of Sabine.

11. The collision was not caused in any way by the negligence of those in charge of the ZAPATA UGLAND, or by the unseaworthiness of the drilling vessel. The sole fault for the collision lay with the VULCAN and Sabine.

12. The Court finds that the value of the tug VULCAN immediately before the collision was $165,000, and that her value immediately after the collision, deducting the reasonable cost of repairs for damages incurred in such collision which the Court finds to be $30,000, and adding to it freight due and owing, was $135,245.65. The tug TROJAN is somewhat newer but otherwise almost identical to the VULCAN. At the time of the collision in question, the value of the TROJAN was $175,000. The tug HERMES at the time of the collision was worth $600,000.

13. At the time of the collision, the tugs TROJAN, HERMES and VULCAN were all engaged in providing towing services incident to assisting the ZAPATA UGLAND to sea. They were engaged in a common enterprise. Although the HERMES had been released a few moments before the collision, she had not returned to the Sabine dock and had not undertaken a new voyage or contractual commitment to any other parties.

14. By reason of the collision between the VULCAN and the ZAPATA UGLAND, Zapata Ugland Drilling, Inc. was damaged in the total sum of $289,078.02, consisting of the following:

a) The collision caused a delay in departure for the North Sea of seven days and seven hours. This delay, in turn, caused a lost revenue to Zapata Ugland Drilling, Inc. of $211,582.28. Zapata Ugland

Drilling, Inc. had a drilling contract with Total Oil Marine, Ltd., which provided as subsequently adjusted, for a daily operating rate of hire of $29,017. The amount of daily rate of hire actually paid by Total to Zapata Ugland Drilling, Inc. for the first eight days of operation in the North Sea was at a rate of $29,017. Since Zapata Ugland Drilling, Inc. has the vessel under a bareboat charter for a fixed time period, at the end of which the vessel will go to her owners, the delay occasioned by the collision caused an irretrievable loss to Zapata Ugland Drilling, Inc. There must be deducted from this lost revenue the savings to Zapata represented by the difference between the normal operating costs and the costs incurred during the delay. These savings are $7,099.00. There must be added to the resulting loss additional expenses incurred by Zapata in the form of extra fuel and oil consumed in the amount of $1,781.20. Thus, Zapata has actually lost a net of $206,264.48.

b) Under the bareboat charter, Zapata Ugland Drilling, Inc. was obligated to repair the ZAPATA UGLAND following the collision. The reasonable and necessary costs of such repairs caused by the collision amount to $20,407.

c) By reason of the collision Zapata Ugland Drilling, Inc. incurred additional charter hire expense for the BAFFIN SERVICE for seven days and seven hours. Such expense totals $36,458.33.

d) By reason of the collision, the initial voyage had to be aborted and the ZAPATA-UGLAND returned to the dock for repairs. Zapata Ugland

Drilling, Inc. incurred liability for tug expenses in the aborted voyage and during repairs in the reasonable and necessary amount of $11,655.51.

e) By reason of the collision, Zapata Ugland Drilling, Inc. also made the following additional reasonable and necessary expenditures:

i. Removal of bunkers and re-bunkering of drilling vessel -	$10,000.00
ii. Crane services -	2,235.15
iii. Diving services -	168.00
iv. Launch services -	600.00
v. American Bureau of Shipping classification survey -	458.65
vi. Helicopter service -	402.50
vii. Pilotage fees -	273.35
viii. X-ray Inspection -	155.20
TOTAL:	$14,292.85

15. Following the collision of June 2, 1974, Zapata Ugland Drilling, Inc. assembled its damage proofs and submitted a detailed listing of the damages by a letter dated July 16, 1974, from counsel for Zapata to counsel for Sabine. This accounting listed damages totalling $323,054.55. An opportunity was given to Sabine to examine the books and records of Zapata Ugland Drilling, Inc. to verify the amounts claimed. Subsequent discovery has altered the damage proofs only slightly. Rather than make any legitimate, bona fide effort to satisfy the claim of Zapata Ugland Drilling, Inc., Sabine instituted this action seeking exoneration from or limitation of liability. Despite the fact that depositions were taken shortly after

the casualty which clearly showed that the sole fault for the collision lay with the VULCAN and Sabine, Sabine contested liability by claiming exoneration. Initially, it also sought to limit liability to $65,000, a position justified by neither the facts nor the law which is clearly applicable to the circumstances of the collision. Under these circumstances, it is only just to allow Zapata Ugland Drilling, Inc. pre-judgment interest on the amount of its claim. Such interest should run from August 1, 1974, a date by which Sabine clearly knew of the nature and magnitude of the claim and had an opportunity to discover with precision the great bulk of the amount of the claim. Zapata's cost of borrowing money has been 12% per annum, which is an appropriate rate for pre-judgment interest.

16. By way of counterclaim, Sabine proved reasonable and necessary towing charges in the amount of $14,290.-01, which have not been paid by Zapata Ugland Drilling, Inc. Of that sum, $11,361.75 was towing charges incurred by Zapata Ugland Drilling, Inc. by reason of the collision made the basis of this case.

Conclusions of Law

1. This Court has jurisdiction over the subject matter of this suit, over the parties, Sabine Towing & Transportation Company, Inc., petitioner, and Zapata Ugland Drilling, Inc., claimant, and over petitioner's tugs HERMES, VULCAN and TROJAN.

2. The collision was caused solely by the fault of Sabine. Therefore, Sabine is not entitled to exoneration and it is liable to Zapata for damages proximately caused by the collision.

3. Sabine, petitioner for limitation of liability under 46 U.S.C., § 183, *et seq.*, has the burden of proving that it is entitled to limit liability. It must show that the negligence and unseaworthiness which caused the collision were not within its privity or knowledge. See, *China Union Lines, Ltd. v. A. O. Andersen & Co.*, 364 F.2d 769, 787 (5th Cir. 1966); *In Re Marine Sulphur Queen*, 460 F.2d 89, 101 (2d Cir. 1972). Since Sabine has failed to meet its burden of proof on the absence of privity or knowledge, it cannot limit liability.

4. Alternatively, the Court concludes that there was actual privity and knowledge on the part of Sabine's managing officers or agents with the fault of the VULCAN and her unseaworthiness, and that managing officers and agents of Sabine were negligent as set forth in Findings of Fact Nos. 8, 9 and 10. Such negligence and unseaworthiness were proximate causes of the collision. Thus, Sabine is not entitled to limit liability. *China Union Lines, Ltd. v. A. O. Andersen & Co., supra.*

5. Alternatively, the towage contract between the parties was a personal contract and, therefore, the limitation of Liability Act does not apply. *Coryell v. Phipps*, 317 U.S. 406, 63 S. Ct. 291, 293 (1943). By furnishing an unseaworthy tug to Zapata and by negligently colliding with the ZAPATA-UGLAND, Sabine breached its implied warranty of workmanlike performance to tow the ZAPATA-UGLAND properly and safely. *James McWilliams Blue Line v. Esso Standard Oil Co.*, 245 F.2d 84, 87 (2d Cir. 1957).

6. Alternatively, all vessels owned by Sabine that were committed to the undertaking (the towage of the

ZAPATA-UGLAND) must be surrendered to the limitation fund, since the undertaking was based upon the towage contract between the parties, regardless of whether such vessels were active participants in the direct injury or not. *Brown & Root Marine Operators, Inc. v. Zapata Off-Shore Company*, 377 F.2d 724, 727 (5th Cir. 1967). Thus, the so-called "flotilla" doctrine is applicable. The Court concludes that all three tugs, the VULCAN, TROJAN and HERMES, having a single ownership, were embarked on a common enterprise, and that all three tugs were necessary to the performance of Sabine's contract of towage, and that all three must therefore be surrendered to the limitation fund.

7. The Court concludes that Zapata Ugland is not bound by the exculpatory provisions printed on the back of Sabine's invoices for towing services, since Zapata Ugland Drilling, Inc. had not agreed to such terms prior to the collision. In any event, such provisions are invalid as offensive to public policy. *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955); *Dixilyn Drilling Corp. v. Crescent Towing and Salvage Company*, 372 U.S. 697 (1963).

8. The Court concludes that Sabine is legally liable to Zapata Ugland Drilling, Inc. for damages in the sum of $289,078.02, proximately caused by the collision in question, and that Sabine cannot limit its liability below such amount. Zapata Ugland Drilling, Inc. is also entitled to pre-judgment interest on that amount at 12% per year from August 1, 1974, plus court costs. Judgment shall be entered accordingly.

9. Sabine is entitled to recover from Zapata Ugland Drilling, Inc. on its counterclaim for unpaid towing charges in the amount of $14,290.01.

SIGNED this the 23rd day of February, 1976.

/s/ WILLIAM M. STEGER
United States District Judge